

In re: PHARMACEUTICAL INDUSTRY)	
AVERAGE WHOLESAL PRICE)	MDL No. 1456
LITIGATION)	Civil Action No. 01-12257-PBS
)	
)	Subcategory No. 06-11337-PBS
THIS DOCUMENT RELATES TO:)	
)	Hon. Patti B. Saris
<i>United States of America ex rel. Ven-a-Care of</i>)	
<i>the Florida Keys, Inc. v. Abbott Laboratories,</i>)	
<i>Inc., Civil Action No. 06-11337-PBS;</i>)	
)	
<i>United States of America ex rel. Ven-a-Care of</i>)	
<i>the Florida Keys, Inc. v. Dey, Inc., et al., Civil</i>)	
<i>Action No. 05-11084-PBS; and</i>)	
)	
<i>United States of America ex rel. Ven-a-Care of</i>)	
<i>the Florida Keys, Inc. v. Boehringer</i>)	
<i>Ingelheim Corp., et al., Civil Action No. 07-</i>)	
<i>10248-PBS</i>)	

At the hearing on January 27, 2010, the Court directed that the Government describe any information in its files relating to whether state Medicaid claims data has been destroyed. The United States submits this response. This response does not address Medicaid claims data obtained from the States by the Centers for Medicare and Medicaid Services (“CMS”) – referred to as SDUD, MSIS, and SMRF/MAX data. Instead, this response addresses Medicaid pharmacy claims data that ordinarily resides in the possession of each state Medicaid agency or its contractor.¹

¹ The United States emphasizes, as set forth in prior briefs (Master Dkt #6388, Sub. #370), that it has no legal duty to preserve information in the possession, custody, or control of a third party, including another sovereign. The duty to preserve is co-extensive with the duty to

Over the course of the litigation in these consolidated cases, the United States has obtained state Medicaid claims data in two ways. First, the Department of Justice (DoJ) directly approached state personnel and requested claims data from the state Medicaid agencies. Second, the United States received some data produced by the states in response to subpoenas served by defendants. The chart below summarizes the claims data obtained from the states as a result of either the Government’s contacts with the states or pursuant to defendants’ subpoenas.

State Produced Claims Data

	Claims Data Received		
State	Abbott	Dey	Roxane
Alabama		1993-2005	
Alaska	1996-2001	1996-2006	1996-2006
Arkansas	2000-2001	2000-2008	2000-2008
California	1993-2001	1993-2007	1993-2007
Connecticut	1991-2001	1992-2006	1991-2006
Delaware		2002-2008	2002-2008
Florida	1993-2001	1993-2005	1993-2005
Georgia	2000-2001	2000-2006	2000-2006
Hawaii	1993-2001	1993-2006	1993-2006

produce. *See Townsend v. American Insulated Panel Co.*, 174 F.R.D. 1, 5 (D. Mass. 1997) (Collings, M.J.) (“the duty [to preserve evidence] does not extend to evidence which is not in the litigant's possession or custody and over which the litigant has no control”); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 189 (D. D.C.), *modified on reconsideration*, 593 F. Supp. 388 (D. D.C.), *aff’d*, 746 F.2d 816 (D.C. Cir. 1984); Jamie S. Gorelick, *et al.*, *Destruction of Evidence* (1989) § 210 (“destruction of evidence by third parties does not give rise to the inference [of spoliation]”) & Supp. 2009 (collecting cases). There is no evidence that any missing state claims data has ever been in the possession of the United States.

Idaho		1992-2005	1991-2005
Illinois	1991-2001	1992-2006	1991-2006
Indiana	2000-2001		
Iowa	1991-2001	1991-2007	1991-2007
Kansas		1993-2003	1992-2003
Kentucky	1995-2001	1995-2005	1995-2005
Louisiana	1995-2001	1993-2007	1993-2007
Maine	1995-2001	1995-2005	
Maryland	1991-2001		
Massachusetts	1996-2001	1995-2007	1995-2007
Michigan	2000-2001	2000-2007	2000-2007
Minnesota	1999-2001	1999-2007	1999-2007
Missouri	1998-2001	1993-2005	1998-2008
Nebraska		1997-2005	1996-2008
New Jersey	1991-2001	1992-2006	1991-2006
New Mexico		1992-2006	1991-2006
New York	1993-2004	1993-2007	1993-2007
North Carolina	2001	2001-2007	2001-2007
Ohio	1991-2003	1997-2005	1998-2005
Oregon		1996-2008	
Pennsylvania	1997-2001	1997-2007	1997-2007
Rhode Island		1993-2008	1993-2008
South Carolina	1993-2001	1992-2006	1992-2006
Texas	1995-2001	1994-2005	1993-2005
Utah	1996-2001	1997-2007	1997-2007
Virginia	2000-2001	1996-2008	1992-2006
Washington	1991-1997		
Wisconsin	1992-2001	1992-2005	1992-2005
Wyoming		1997-2007	1997-2008

DoJ's efforts to obtain data directly from the states began in late 2006 and continued through early 2008. At the outset, DoJ contacted a limited set of Medicaid agencies for data. In consultation with the Government's damages expert, Dr. Mark Duggan, the Government later expanded its data collection efforts to include states with high levels of Medicaid utilization, as reflected in Medicaid dollars spent. Ultimately, the Government made at least preliminary contact with 50 states in an effort to obtain state data. However, for some states the collection effort was limited or abandoned due to an impending discovery deadline or the burdensomeness of obtaining data from a given state. In the end, these efforts resulted in the United States obtaining claims data from 33 states.²

During the course of the data collection effort, the Government informally communicated with state agencies and obtained information regarding whether and to what extent state data (for years from 1991 on) was accessible. The information provided by state personnel was generally tentative and not always in accordance with the extent of the production which the state was ultimately able to undertake. Several states initially responded that data only from a certain date forward was available, but then produced data from earlier periods. For example, based on contacts with the Commonwealth of Massachusetts, DoJ expected this state to produce data starting from 1996. However, DoJ later learned that Massachusetts' lawyers advised counsel for Dey that the

² These states are: AK, AR, CA, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, MA, MI, MN, MO, NE, NJ, NM, NY, NC, OH, PA, RI, SC, TX, UT, VA, WI, and WY.

Commonwealth's archives contained claims data going back to 1991 and also provided an estimate of the cost of retrieving the archived data. Similarly, California, Connecticut, Hawaii, Louisiana, and New Mexico all advised that they expected to only produce data from dates ranging from 2000 to 2002, yet, as indicated in the above chart, all of these states ultimately produced data from earlier periods.

Conversely, other states may have told DoJ staff that they had claims data going back to a certain date, but never produced it. For example, Minnesota and North Carolina both stated that they had data back to 1991 on archived tapes, but Minnesota's production only went back to 1999, North Carolina's to 2001; Missouri advised that it had data going back to 1992, but ultimately produced data for Abbott NDCs from 1998 forward. Other states were unable to advise how far back they could go to retrieve archived data when they were initially contacted by DoJ. Delaware, for example, advised that it had implemented a new storage "system" in 2002, but could not state to DoJ whether it could access earlier archived data. Virginia also indicated that it might not be able to access older, stored, data. Some states (for example, Oregon and Colorado) simply declined to produce any data to the United States.

Georgia was the only state which affirmatively stated that archived data had been destroyed. For other states, DoJ has been unable to make a final, conclusive determination regarding the extent of the archived data. That being said, some states indicated that they did not expect to be able to access older data. As Government counsel

indicated at the January 27 hearing, DoJ understands that the State of Mississippi has been unable to retrieve its own data and consequently has subpoenaed Medicaid data from CMS. Representatives of the State of Florida advised that they were unable to produce data from prior to October 1993; Indiana and Michigan advised that they could not produce data from before 2000; an Oklahoma official advised he was uncertain how far back the data extended, but it was “likely to be” around 2000 (subsequently, the United States received no data from Oklahoma); Pennsylvania advised that it could not produce data from before 1997. The United States has no further information than that stated above regarding whether the data from these states for earlier periods has been destroyed or has been archived in a manner that renders retrieval unduly burdensome.

The United States believes that defendants issued subpoenas to 38 states. Although Dey served subpoenas on numerous states, it later withdrew them after the Court denied Dey’s motion to extend discovery. *See* Dkt. Order of 6/10/09, denying Dkt. 5765 Motion to Extend the Production Deadline for the Limited Purpose of Receiving Medicaid Claims Data from States. The Government received data from seven states in connection with the defense subpoenas.³ The time frames for the data from those states are also set out in the above chart. (The Government received claims data from Kentucky and Ohio as a result both of the Government’s own efforts and as a result of defense

³ Those states are: AL, KY, ME, MD, OR, VA, and WA. The United States notes that the State of Oregon rebuffed the DoJ’s request for voluntary production and only later produced data in response to a defense subpoena.

subpoenas.) Defendants, presumably, can provide additional information about any objections asserted by the states and whether any state agency provided information, while negotiating its subpoena compliance obligations, regarding the extent of the claims data it maintained.

The United States received no claims data, based either on its own efforts or via defense subpoenas, from the states of Arizona, Colorado, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, South Dakota, Tennessee, Vermont and West Virginia, and the District of Columbia. Nor does the United States have any more particularized information regarding the data retention policies of these Medicaid programs and whether or to what extent the programs could have produced historical data relating to claims for defendants' drugs.

The foregoing describes only the extent of the data received by the United States - and which has been available to defendants. The United States does not purport to describe the extent, if any, to which defendants may have obtained claims data, unbeknownst to the United States, beyond that set out in the above chart.

Respectfully Submitted,

For the United States of America,

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February 5, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused an electronic copy of the above UNITED STATES' RESPONSE TO THE COURT'S INSTRUCTION RELATING TO STATE MEDICAID CLAIMS DATA to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

February 5, 2010

/s /Justin Draycott